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No. 96-1569

In The

Supreme Court of the United States

October Term, 1997

DANIEL BOGAN AND MARILYN RODERICK,

Petitioners,

vs.

JANET SCOTT-HARRIS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Brief of Respondent Scott-Harris ("Scott-Harris") is notable for what it does *not* say: it does not take issue with *any* of the critical points made in the Individual Defendants' opening Brief. Scott-Harris does not deny that nineteenth century common law gave municipal legislators absolute immunity for the sorts of discretionary acts that are at issue here. Although she insists that absolute immunity for local legislators is unnecessary, she does not deny that the policies that support absolute immunity for state and regional legislators are fully applicable here. She also does not deny that state legislators or members of Congress act in a legislative capacity when they pass laws that in relevant respects are identical to the ordinance that eliminated her position. And she does not deny that the First Circuit's approach would largely abrogate immunity for local legislators by requiring, in virtually every case, a trial on the merits *before* entitlement to immunity is determined. In short, Scott-Harris has not offered any persuasive defense of the decision below.

ARGUMENT

I. LOCAL LEGISLATORS ARE ENTITLED TO ABSOLUTE IMMUNITY FROM LIABILITY UNDER 42 U.S.C. § 1983 FOR ACTIONS TAKEN IN A LEGISLATIVE CAPACITY.

A. At The Time § 1983 Was Enacted, Local Legislators Enjoyed Absolute Immunity For Discretionary Acts Taken In A Legislative Capacity.

Scott-Harris makes no real attempt to argue that local legislators did not enjoy common law absolute immunity at the time of § 1983's enactment for the kinds of discretionary acts at issue here. Instead, she argues that: (1) legislators were not immune from liability for purely "ministerial" acts; and (2) a review of slander actions against local legislators reveals that they only enjoyed a qualified immunity from suit. Resp't Br. at 15-20. The first point is irrelevant; the second, incorrect.

A "ministerial" act is one which involves "obedience to instructions" and "demands no special discretion, judgment or skill." *See Black's Law Dictionary* 996 (6th ed. 1990). Courts have allowed suits against legislators only in those rare cases where their challenged actions were of such a purely mandatory, "ministerial" nature. *See Amy v. The Supervisors*, 11 Wall. (78 U.S.) 136, 138 (1871) (finding liability where plaintiff had successfully obtained a judgment against the county and the individual legislators then defied a court order to levy a tax to raise the money necessary to pay the judgment; the Court stated that liability could be imposed where, as under these facts, "the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act"); *Farr v. Thompson*, 11 Wall. (78 U.S.) 139 (1871) (same); *Caswell v. Allen*, 7 Johns. 63, 66, 68 (N.Y. 1810) (individual legislators could be found liable where a statute requiring them to levy a tax was "mandatory, and obliged them to do it without delay. . . . No discretion appears to have been given to the supervisors"); *Morris v. The People*, 3 Denio 381 (N.Y. 1846) (law required legislators to pay judge's salary).

Implicit in this line of cases is the recognition that ministerial actions, because they do not involve discretion or judgment, are not traditional "legislative" acts for purposes of immunity analysis. This point is illustrated by the 20th century counterpart to *Amy*, *Spallone v. United States*, 493 U.S. 265 (1990).

In *Spallone*, the Court removed contempt sanctions which had been imposed on four city councilmembers for refusing to pass legislation implementing a consent decree. The majority in *Spallone* reasoned that sanctions against the city should have been tested before the question of imposing sanctions against the individual councilmembers should "even have been considered." *Spallone*, 493 U.S. at 280. What is of particular significance here is the dissenting opinion, authored by Justice Brennan and joined in by three other Justices. Justice Brennan first emphasized the compelling reasons underlying the doctrine of legislative immunity and specifically stated – in this action involving city councilmembers – that, with respect to traditional legislative actions, "[t]o encourage legislators best

to represent their constituents' interests, legislators must be afforded immunity from private suit." *Id.* at 300 (Brennan, J., dissenting). He went on to find the contempt sanctions nevertheless supportable only because, in his view, "once a federal court has issued a valid order to remedy the effects of a prior, specific constitutional violation, the representatives *are no longer acting in a field where legislators traditionally have power to act.*" *Id.* at 301 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951)) (emphasis added).

Nor is it the case that every legislative action which is subsequently found unconstitutional becomes, *ex post*, "ministerial" because a legislator does not have "discretion" to violate the Constitution. *See* Resp't Br. at 23, n.32. A ministerial act is one concerning which there is no discretion *ab initio*, when the matter is first presented to the legislator; it does not encompass matters where the legislator possessed discretion but exercised that discretion incorrectly. A contrary view would result in the abolition of *any* immunity for legislators whatsoever in § 1983 actions, as Scott-Harris herself concedes. *Id.* at 23-24, n.32.[1] *See, e.g., Gregoire v. Biddle*, 177 F.2d 579, 581 (CA2 1949) (Learned Hand, J.):

> The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine [of immunity].

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[1] Because "[a] mistake as to his duty and honest intentions will not excuse the offender" who fails to carry out a ministerial function, *Amy v. The Supervisors*, 11 Wall. (78 U.S.) at 138, under Scott-Harris' view the "discretionary-ministerial doctrine" would seemingly also result in strict liability for legislators charged with constitutional violations.

The Individual Defendants' challenged actions in the instant case were plainly discretionary, not "ministerial." No specific court order or statute required the City of Fall River to continue the Department of Health and Human Services or Scott-Harris' position within it. Instead, the decision to eliminate the Department was a quintessential discretionary, legislative act, reflecting one of a number of steps open to the City with respect to its perceived budgetary needs for the upcoming fiscal year. *Amy* and the narrow line of cases like it are not remotely applicable here.

A review of the nineteenth century slander decisions cited by Scott-Harris similarly fails to demonstrate that legislators did not possess absolute immunity for discretionary acts taken in a legislative capacity. Instead, this case law shows that courts allowed slander actions only against legislators who were not acting in a legislative capacity, or against private citizens who were speaking in some public forum. *See, e.g., Bradley v. Heath*, 12 Pick. (29 Mass.) 164, 165 (1831) (defendant selectman's alleged slander made in the course of overseeing the proper conduct of a town election); *White v. Nicholls*, 44 U.S. 266 (1845) (defendants were private citizens who allegedly libeled a public officer in a letter to the President); *Smith v. Higgins*, 16 Gray (82 Mass.) 251 (1860) (defendants were private citizens whose alleged slander was made in the course of a town meeting); *McGaw v. Hamilton*, 184 Pa. 108 (1898) (legislator's alleged slander found by jury to have been made outside the course of debate in a legislative body).[2]

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[2] The other authority cited by Scott-Harris is equally unpersuasive. In *Vail v. Owen*, 19 Barb. 22, 29 (N.Y. 1854), the defendants were tax assessors sued for an allegedly improper assessment; the court held that the challenged action was "a judicial act" and found them immune from suit. In *Easton v. Calendar*, 11 Wend. 90, 93 (N.Y. 1833), the defendants were school district trustees responsible for preparing a tax list; the court similarly described the job of apportioning the tax as "in my opinion, to a certain extent, in the nature of a judicial act." In *Greenwood v. Corbey*, 26 Neb. 449 (1889), a post-1871 decision, the individual defendant was a city mayor who criticized the city attorney at a public meeting of the city council. The court appears to have been unable to determine how to

In sum, it is clear that the widely held view at the time of § 1983's enactment was that local legislators were absolutely immune from suit for discretionary actions taken in a legislative capacity. *See* Pet. Br. at 23-25; Brief of *Amicus Curiae* National League of Cities, *et al.* at 10-15 [hereinafter "Nat. League Br."].

B. Nothing In § 1983's History Or Purposes Counsels Against Absolute Immunity From § 1983 Liability For Local Legislators.

Scott-Harris does not dispute that the only legislative history on point is supportive of absolute legislative immunity.

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characterize the mayor's action, as it (a) cited as the "leading case in this country on the subject of privileged communications" an action involving the privilege applicable to *private citizens* who presented a petition to their county council, (b) discussed the mayor's *executive* responsibilities, noting that he possessed by statute "superintending control of all the officers and offices of the city," and (c) found an "absence of authorities in cases like that under consideration" – notwithstanding the relative wealth of legislative immunity cases and treatises discussing them which then existed. *Id.* at 452, 455, 456.

Of the cases cited by Scott-Harris, it therefore appears that only one, *Baker v. The State*, 27 Ind. 485, 489 (1867), arguably held that individual legislators could be liable if "they acted corruptly" at the time of § 1983's enactment. Even in this single instance, however, it is unclear precisely what the court meant by this qualification. In one of the most ringing proclamations of absolute immunity for local legislators, *Wilson v. New York*, 1 Denio 595, 599-600 (N.Y. 1845), for example, the court similarly noted that certain steps could be taken if a legislator acted "corruptly," but carefully limited those steps as follows:

> The civil remedy for misconduct in office is more restricted and depends exclusively upon the nature of the duty which has been violated. . . . If corrupt, [the legislator] may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may have been done. These principles are too familiar and well settled to require illustration or authority, and in my view of the present question they govern and control it.

See Nat. League Br. at 15-16. Her arguments that the considerations which impelled this Court to recognize absolute immunity for state and regional legislators are not present with respect to local legislators are unpersuasive.

This Court follows a well-established "functional" test in determining whether the purposes behind immunity from § 1983 liability for government representatives are present. *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Forrester v. White*, 484 U.S. 219 (1988). The Court followed this approach in *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), where it determined that the functions which regional legislators perform are comparable to those of legislators at other levels of government. Given the similarity of function, the Court concluded that the rationale behind the provision of absolute immunity "is equally applicable to federal, state and regional legislators." *Id.* at 405.

Significantly, Scott-Harris does not – and cannot – argue that the legislative functions performed by the Individual Defendants are different from such functions at the federal, state, or regional level. Instead, she eschews a functional analysis altogether and attempts to argue that a variety of policy reasons, unrelated to function, militate against absolute immunity. As she notes, however, resort to such freewheeling "policymaking" considerations has come under increasing criticism by this Court. *See* Resp't Br. at 26, n.36 and cases cited therein. Nowhere does she attempt to articulate a policy argument against absolute immunity which would not apply with equal, if not greater, force at the federal, state, and regional levels. Her policy arguments lack merit at the local level as well. Specifically:

1. A rule of qualified immunity for local legislators is as inadequate to serve the compelling interests of absolute immunity at the local level as it is at the federal, state, and regional levels. The evils of diverting legislators from their public duties, disturbing the decision making process, and deterring qualified individuals from seeking public office are all equally present at the local level as at the federal, state, and regional levels. Indeed, the proximity of local legislators to their constituents makes the potential perils still more pressing and the

corresponding need for absolute immunity all the more compelling. *See, e.g., Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 612 (CA8 1980). If, as Scott-Harris contends, qualified immunity is sufficient to address these concerns, this would logically compel the wholesale abolition of absolute immunity at the state and regional levels of government as well.

2. The possibility that local legislators may be indemnified if they are found to have violated § 1983, following full discovery and trial, hardly supports the view that absolute immunity is unnecessary. They will still be forced to "divert their time, energy, and attention from their legislative tasks to defend the litigation." *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 733 (1980) (quoting *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975)). The purchase of private insurance is an equally feeble palliative.[3]

3. Effective remedies against abuse are fully available at the local level. First, one can sue the city or municipal entity for injunctive relief and damages – the latter constituting an alternative which does not even exist at the state level. *See Lake Country Estates*, 440 U.S. at 405 n.29 ("If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests.") (citation omitted).[4] Willful

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[3] Scott-Harris seeks to prove too much if she argues that indemnification and/or insurance can in fact remove all fear of ultimate personal liability and the diversion of time and energy which invariably accompanies litigation. If indemnification or insurance could have this effect, legislators would be just as free to engage in abuses as Scott-Harris asserts is the case under a rule of absolute immunity.

[4] Scott-Harris' contention that the availability of a suit against the municipal entity is meaningless because she could not prove her case against the City of Fall River lacks all merit. As the First Circuit Court of Appeals noted, Scott-Harris made almost no effort to establish her case against the City. App. to Pet. for Cert. at 61-63. It does not follow from this that, because it is "much simpler" to do so, she should be able to single out individual legislators as defendants and hold them personally liable for legislation which she cannot prove is unlawful. Resp't Br. at 35. *See also Rateree v. Rockett*, 852 F.2d 946, 951 n.3 (CA7 1988) (upholding absolute

deprivations of constitutional rights by individual legislators acting under color of state law also remain criminally punishable under 18 U.S.C. § 242. Second, the absence of any immunity for city governments not only provides an effective remedy for wronged individuals; it also provides an additional check on unlawful behavior by municipal legislators. *See Spallone*, 493 U.S. at 280 (noting that the prospect of a "bankrupting fine" against the municipal entity would likely influence the actions of individual city councilmembers); *Owen v. City of Independence*, 445 U.S. 622, 651-652 (1980). In many, if not most, municipalities today, even a single large judgment can have a direct effect upon the municipality's ability to fund the most fundamental public services – schools, police, parks, and roads. Third, resort to the ballot box is a far more effective check on abuse at the local level than it is at the state or federal level. Even a substantial judgment will have little, if any, direct impact upon most voters at the national or state level (where only injunctive relief is available in any event). In contrast, as noted, a local legislator's role in passing unlawful legislation will likely have a direct and immediate effect upon his or her constituents' daily lives, and hence on their voting propensities. Further, it is almost axiomatic that each vote at the local level carries more weight than it does at the state or federal level, where the sheer numbers involved make the possible impact of any one bloc of voters far less significant.

4. Absolute immunity for local legislators has not caused and will not cause rampant lawlessness. All of the checks noted above are present to safeguard against abuse; in particular, none of the extraordinary hypothetical statutes enumerated by Scott-Harris at pages 40-41 of her Brief could withstand immediate challenge in actions brought directly against the municipality which enacted them. In addition, all would

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immunity for local legislators who had voted to eliminate the plaintiffs' positions and observing that "the plaintiffs in this case did succeed in a lawsuit against the city of Harvey and recovered damages. This, at least, demonstrates the availability of other relief.").

unquestionably be viewed as legislative if enacted at the federal, state, or regional levels. Absolute legislative immunity is, of course, well established at these other levels of government, with no apparent catastrophic effect.[5] Indeed, absolute immunity exists with respect to a host of other government officials – judges, prosecutors, and members of the executive branch of government. Our system of government has not toppled. There is no reason to believe that municipal legislators, as a group or individually, are more dramatically inclined to corruption or abuse than any of these other members of our various branches of government.[6]

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[5] No one can deny that absolute immunity, wherever it is deemed applicable, may very occasionally permit individual "scoundrels" to escape legal liability. Such a result is deemed warranted, not because of any public interest in protecting such individuals, but because it is necessary to serve a far greater public good. As Judge Learned Hand observed in *Gregoire v. Biddle*, 177 F.2d 579, 581 (CA2 1949):

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith.

[6] This Court has already considered and rejected precisely the same kind of "rampant lawlessness" argument with respect to absolute immunity which Scott-Harris seeks to make here in *Barr v. Matteo*, 360 U.S. 564, 576 (1959) (Harlan, J.):

> We are told that we should forebear from sanctioning any such rule of absolute privilege lest it open the door to

5. Scott-Harris' contention that local legislation necessarily affects fewer people than state or federal legislation is simply untrue. Federal legislation often focuses on small numbers of individuals. *See* Nat. League Br. at 26 n. 11 (tax legislation contained 79 separate provisions affecting 100 or fewer people). The local governments of our three largest cities each enact legislation affecting more people than do twenty of our state governments.[7] Further, the number of people affected by a particular governmental actor's decision has never been the test of whether immunity should attach. Absolute immunity for judges and prosecutors is of course long established; the

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> wholesale oppression and abuses on the part of unscrupulous government officials. It is perhaps enough to say that fears of this sort have not been realized within the wide area of government where a judicially formulated absolute privilege of broad scope has long existed. It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price is a necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner. We think that we should not be deterred from establishing the rule which we announce today by any such remote forebodings.

[7] The three largest cities are New York (7,333,000), Los Angeles (3,449,000), and Chicago (2,732,000). U.S. Bureau of the Census, *Statistical Abstract of the United States: 1996* 44-46 (116th ed. 1996). The twenty smallest states, in descending order of size, are Mississippi (2,697,000), Kansas (2,565,000), Arizona (2,484,000), Utah (1,951,000), West Virginia (1,828,000), New Mexico (1,685,000), Nebraska (1,637,000), Nevada (1,530,000), Maine (1,241,000), Hawaii (1,187,000), Idaho (1,163,000), New Hampshire (1,148,000), Rhode Island (990,000), Montana (870,000), South Dakota (729,000), Delaware (717,000), North Dakota (641,000), Alaska (604,000), Vermont (585,000), and Wyoming (480,000). *Id.* at 29-30.

great majority of these protected judicial and prosecutorial functions affect only single individuals or small group of individuals. *See, e.g., Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislative action affecting single individual held entitled to absolute immunity); *Barr v. Mateo*, 360 U.S. 564 (1959) (executive department action affecting two individuals held entitled to absolute immunity).

6. A workable rule with respect to when absolute immunity applies is no more difficult to demarcate with respect to local legislators than it is with respect to any other governmental function to which immunity attaches. Again, the Court's well-settled focus is on the nature of the function performed, not the identity of the actor or the level of government at which he or she performs the function. *See Forrester v. White*, 484 U.S. 219 (1988); *Butz v. Economou*, 438 U.S. 478 (1978). The analysis for local legislators is precisely the same as it was in *Lake Country Estates* for regional ones: "to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability." 440 U.S. at 406. Further, courts are required to draw similar lines with respect to every position which enjoys any form of immunity, at every level of government – judges, prosecutors, legislators, and executive branch members. Simply because line drawing in certain cases may prove difficult does not mean there should be no line at all. *See Forrester*, 484 U.S. at 227 ("This Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity."). Scott-Harris also fails to note that such line drawing will be necessary in any event, regardless of the level of immunity which applies.[8]

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[8] The difficulty of distinguishing between "legislative" and "administrative" acts noted by Scott-Harris exists principally where, as under the First Circuit's approach, courts look beyond the issue of whether a legislative function was involved to inquire into the motivation *behind* the legislation. This difficulty is avoided altogether when the inquiry is

The critical point is that no difficult line drawing is required in the instant case. The Individual Defendants' challenged actions involved classic legislative activity: the submission of a proposed ordinance to eliminate a city department to an elected city council and the ordinance's subsequent passage into law. No process could be as recognizably a part of our history and tradition of representative government.

7. Finally, Scott-Harris never pauses to address the evils which would follow adoption of a rule denying local legislators the same form of absolute immunity that legislators at every other level of government enjoy. Yet all of the concerns which have made absolute immunity a cornerstone of our system of government, with roots ultimately extending back to sixteenth and seventeenth century England, apply with equal force at the local level. These concerns – revolving principally around the inevitable distraction of litigation, the distortion of the decision making process which accompanies it, and the deterrent impact on qualified individuals seeking to hold office – are based upon the need for a free, resolute, and effective legislature. This need is as compelling at the local level of government as at its federal, state, and regional counterparts.[9] Approaches such as

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properly limited to a determination of whether the individual defendant was acting in a legislative capacity. *See* discussion at pages 14-15, *infra*.

[9] If this Court should find that the Individual Defendants are not entitled to absolute immunity, the action should be remanded for reconsideration based upon the Individual Defendants' entitlement to a qualified immunity defense. Even Scott-Harris concedes that qualified immunity should be available to local legislators if absolute immunity is deemed inapplicable. *See* Resp't Br. at 24-25. Under the approach enunciated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the district court should determine, as a threshold question, whether an official's alleged misconduct violated law that was "clearly established at the time [the] action occurred." *Id.* at 818. The availability of the qualified immunity defense was not addressed at any point in the proceedings below because, under controlling First Circuit law (as well as the law in every other Circuit to consider the question), the Individual Defendants could avail themselves of an absolute immunity defense for their legislative acts. *See* App. to Pet. for Cert. at 64; Pet. Br. at 20-21. However, as the First Circuit noted in the

that suggested by Scott-Harris and the First Circuit ignore these concerns, and in fact compound them by threatening to fling wide the courthouse doors to all citizens suspicious of individual legislators' motives.

C. Denying Local Legislators Absolute Immunity Would Require This Court To Overrule *Lake Country Estates*.

No meaningful distinction can be drawn between the regional legislators found absolutely immune from § 1983 liability in *Lake Country Estates* and the local legislators before the Court in this case – certainly none which would militate against a finding of absolute immunity for the Individual Defendants.[10] As Justice Marshall noted in his dissenting opinion in *Lake Country Estates*:

> [T]he majority's reasoning in this case leaves little room to argue that municipal legislators stand on a different footing than their regional counterparts. Surely the Court's supposition that the "cost and inconvenience and distractions of a trial" will impede officials in the "uninhibited discharge of their legislative duty" applies with equal force whether the officials occupy local or regional positions.

440 U.S. at 407-408 (Marshall, J., dissenting) (citations omitted).

Denying local legislators absolute immunity would, therefore, require this Court to overrule *Lake Country Estates*. This Court has, of course, repeatedly announced its profound antipathy to such a reversal of precedent. *See, e.g., Hilton v. South*

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instant case, "one could argue that Scott-Harris' comments about, and efforts to discipline, a particular employee do not qualify as speech on a matter of public concern." App. to Pet. for Cert. at 54. The logical conclusion to be drawn from this is that the Individual Defendants' conduct "[did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

[10] The only real distinction between the two groups is that the regional legislators in *Lake Country Estates* were appointed, whereas the two Individual Defendants were elected. This case thus presents an even stronger argument for absolute immunity than was present in *Lake Country*. *See Aitchison v. Raffiani*, 708 F.2d 96, 98 (CA3 1985).

Carolina Public Railways Commission, 502 U.S. 197, 202 (1991) ("[W]e will not depart from the doctrine of *stare decisis* without some compelling justification.") (citations omitted). No such compelling justification exists in this case.[11]

II. LEGISLATORS ACT IN THEIR LEGISLATIVE CAPACITY WHEN THEY PROPOSE OR VOTE ON MUNICIPAL LEGISLATION.

There is no question that the Individual Defendants' challenged actions entailed proposing and voting on municipal legislation. Under the approach first enunciated by this Court in *Tenney v. Brandhove*, 341 U.S. 367 (1951), this should end the inquiry as to whether they were acting in a legislative capacity. As the Court held in *Tenney*, "courts should not go beyond the narrow confines of determining that [the challenged

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[11] Significantly, Scott-Harris does not argue for this result and, indeed, only mentions *Lake Country Estates* twice in her 49-page brief. The argument she does make – that *Wood v. Strickland*, 420 U.S. 308 (1975), is controlling law – lacks merit. The holding in *Wood* was limited to a finding that individual school board members enjoyed qualified immunity "in the specific context of school discipline," 420 U.S. at 322 – a context in which, among other distinctions, the school board members were deemed to act more in a judicial than in a legislative capacity. *See id.* at 319 ("School board members, among other duties, must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations."). School board members also never possessed the traditional common law immunity which applies to legislators. *Contrast Lake Country Estates*, 440 U.S. at 403 n.24 ("legislative immunity 'enjoys a unique historical position' ") (quoting Note, *Developments in the Law – Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1200 (1977)) *with Wood*, 420 U.S. at 318 ("Common-law tradition . . . lead[s] to a construction of § 1983 extending a qualified good-faith immunity to school board members. . . . "). The utter lack of relevance of *Wood* in the legislative immunity setting is perhaps best illustrated by the fact that neither the majority nor the dissenting opinions in *Lake Country Estates*, decided just four years after *Wood*, found *Wood* sufficiently relevant to the issue before the Court as to warrant even a single cite.

action] may fairly be deemed within [the legislature's] province." *Id.* at 378. Scott-Harris nevertheless contends that it is critical to look beyond the function performed by the individual legislators and inquire into their motivations and/or the scope and nature of the challenged legislation. *See* Resp't Br. at 38-42. This position is insupportable.

The impropriety of inquiry into motivation was established in *Tenney*, where this Court stated that "[t]he claim of an unworthy purpose does not destroy the privilege. . . . The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney*, 341 U.S. at 377. In other words, only *after* an action has been found not to have been legislative does the issue of motivation become proper; it cannot be used to determine whether the action was legislative in the first instance. A contrary rule would have the invariable effect of rendering the resolution of the immunity defense indistinguishable from a determination of the merits of a plaintiff's claim. *See Butz v. Economou*, 438 U.S. 478, 520 (1978) (Rehnquist, J., concurring and dissenting) ("It amounts to saying that an official has immunity until someone alleges he has acted unconstitutionally. But that is no immunity at all: The 'immunity' disappears at the very moment when it is needed.").[12]

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[12] This is clearly illustrated by the result of the approach followed by the First Circuit in the instant case, as well as by Scott-Harris' defense of it. To quote from her Brief, "[i]n some cases, such as the present one, this inquiry [into whether challenged action is 'legislative'] requires a factual determination by the jury as to the motivation of the persons who enacted the ordinance. . . . That analysis is the short answer to the question of whether the conduct in this case was 'legislative'. *Since the jury found the petitioners' conduct did not involve any legitimate legislative activity, they have no legislative immunity.*" Resp't Br. at 38 n.50 (emphasis added). In short, under this approach, an individual legislator is entitled to immunity only if a jury finds that his or her action was "legitimate." This is surely the equivalent of finding that the legislator has "no immunity at all." *Butz v. Economou*, 438 U.S. at 520 (Rehnquist, J., concurring and dissenting).

The limited scope of the challenged legislation is an equally insupportable basis for a conclusion that immunity should not apply. There is nothing in the pre-1871 case law with respect to legislative immunity which could justify such an approach. The compelling public goals served by immunity apply with full force to legislation that affects only a narrow subject or limited number of people. No one would deny, and Scott-Harris does not, that state legislators or members of Congress act in a legislative capacity when they pass laws that are in relevant respects identical to the ordinance that eliminated her position. Indeed, as noted above, the challenged legislative action in *Tenney* involved a single individual; the Court nowhere suggested that this transformed the activity in question from protected "legislative" action to unprotected "administrative" action. Further, because most slander actions are based upon statements concerning specific individuals, focusing on the number of individuals aggrieved by a legislator's conduct would eviscerate the immunity doctrine with respect to defamation claims – an area where legislators are often most in need of protection, and which has deep roots in our constitutional and common law history. *Cf. Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 733 (1980) (observing that in *Tenney*, the Court found state legislators' common law immunity similar in origin and rationale to that accorded Congressmen under the Speech and Debate Clause).[13]

The nature of the challenged legislation is equally irrelevant in determining whether immunity should attach. While the legislation

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[13] Any rule which makes the availability of immunity turn upon the scope of the challenged legislation would also be both unrealistic and unworkable. Courts would be required to make hopeless distinctions between different kinds of legislative actions, elevating form over substance in so doing. To give just one of many possible examples: if a legislature enacted five or six separate ordinances, each eliminating one or two positions, over a period of weeks as part of an ongoing budgetary process, would each ordinance be viewed as "administrative"? In contrast, if the legislature decided to eliminate precisely the same number of positions in a single, more sweeping ordinance, would this now become "legislative"?

in question here – the elimination of a position (indeed, a department) in the context of budget making for the upcoming fiscal year – was quintessentially legislative in character, the precise nature of the legislation should not be dispositive.[14] The possible subjects of legislative activity and the forms which may be adopted to deal with those subjects are myriad; one searches in vain for any precedent or policy that would support the view that some would be considered "truly" legislative and that others would not. To return again to *Tenney*: "courts should not go beyond the narrow confines of determining that [the challenged legislation] may fairly have been deemed within [the legislator's] province," 341 U.S. at 378, for purposes of determining whether absolute immunity should apply.

III. ABSENT A FINDING THAT CHALLENGED LEGISLATION IS UNLAWFUL, INDIVIDUAL LEGISLATORS CANNOT BE THE PROXIMATE CAUSE OF ANY ACTIONABLE INJURY TO A PLAINTIFF.

The Individual Defendants' position with respect to the third issue before the Court is straightforward. Scott-Harris

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[14] Contrary to Scott-Harris' assertion, the Individual Defendants do not "concede" that legislative actions which result in the termination of an individual employee cannot be viewed as truly "legislative," and no such concession is "compelled" by the Court's decision in *Forrester v. White*, 484 U.S. 219 (1988). Resp't Br. at 39 n.53. The Court in *Forrester* found that a judge's termination of a probation officer was not entitled to absolute immunity, not because of the *form* of the action (termination versus position elimination) or because it affected only a single individual, but because the judge was not performing a *judicial function* with respect to the termination decision. *See Forrester*, 484 U.S. at 224-225, 229 (discussing the "functional approach" to immunity questions followed by the Court and finding that the defendant judge's challenged actions "were not themselves judicial or adjudicative").

Scott-Harris' related assertion that "this is not a close case" because an action cannot be characterized as inherently legislative "if it could just as readily have been done by an administrative official," to the extent it is correct at all, compels a judgment in favor of the Individual Defendants

claimed that they violated her constitutional rights by virtue of their role in enacting unconstitutional legislation. She failed to prove that the legislation was unconstitutional. It follows that the Individual Defendants' actions cannot be the proximate cause of any actionable injury to her.[15]

Contrary to Scott-Harris' characterization of the issue, therefore, the question is not whether the Individual Defendants' actions were the proximate cause of her dismissal. *See* Resp't Br. at 43. The issue is whether the Individual Defendants' actions were the proximate cause of her *unlawful* dismissal. When the judgment against the City was overturned, so too was any possible basis for a finding that the Ordinance – which could only be enacted by the City – was unlawful. The judgments against the Individual Defendants, legally and logically, should have been overturned as well.

The Individual Defendants have no controlling authority in support of their position because, insofar as they can glean from their legal research into this issue, the argument that an individual legislator can be held personally liable for his or her role in passing lawful legislation is unprecedented. Certainly Scott-Harris has cited no case which addresses this extraordinary proposition.[16]

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here. Resp't Br. at 39. It is uncontroverted that the Department of Health and Human Services, and Scott-Harris' position within it, could only be eliminated by legislative action. *See* J.A. at 88.

[15] Marilyn Roderick also continues to press the additional argument she made below: that she could not be the proximate cause of *any* injury to Scott-Harris, actionable or otherwise, because the legislation which resulted in the elimination of Scott-Harris' job (which was enacted by a six to two margin) would have passed with or without her affirmative vote. *See* Pet. Br. at 44.

[16] The case principally relied upon by Scott-Harris, *Malley v. Briggs*, 475 U.S. 335 (1986), demonstrates the fallacy of her position on this issue. In *Malley*, the plaintiff was wrongfully arrested based upon a police officer's submission of a false affidavit to a magistrate. The police officer was held personally liable because his false affidavits were the proximate cause of the plaintiff's *unlawful* arrest. In the instant case, in contrast, the

Permitting the judgment against the Individual Defendants to stand based upon this record will yield results which are as disastrous as they are absurd. A plaintiff need not make any attempt to establish that he or she was affected by unlawful legislation. Instead, the plaintiff can choose what Scott-Harris candidly describes as the "much simpler" route and simply focus on the actions and ulterior motives of one or more individual legislators. *See* Resp't Br. at 35. With respect to such individual legislators, the plaintiff will merely have to show that, regardless of whether the legislation itself was unlawful, the legislators favored it for "impermissible" reasons. Only one such legislator need be ferreted out in order for the plaintiff to recover all losses which flowed from the "injury" caused by the underlying legislation.

The anomalous nature of the end result is illustrated by this case. The Ordinance survived legal challenge and still has the force of law, the Department of Health and Human Services (and Scott-Harris' position within it) are still eliminated, and the City of Fall River continues to enjoy whatever benefits may have flowed from the enactment of the Ordinance and the elimination of the Department and Scott-Harris' position. At the same time, the two Individual Defendants have been found personally liable and face a staggering judgment for their role in the legislation's enactment. This simply cannot stand.

Finally, Scott-Harris' argument that the Individual Defendants failed to preserve their appellate rights on this issue is baseless. The Individual Defendants had no ground or reason to challenge the district court's jury instructions because, in contrast to the First Circuit, the district court clearly recognized the importance of a finding against the City as a necessary predicate to a finding of liability against the Individual Defendants. *See* Pet. Br. at 51 n.17.[17] It is for this reason that the Individual Defendants did not

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First Court ruled that there was no evidentiary basis for a finding that the Ordinance enacted by the City was unlawful. *See* App. to Pet. for Cert. at 53-63.

[17] The district court specifically instructed the jurors that if they were to find the City not liable, then they were to go no further with their deliberations. J.A. at 200-201, 213; *see also id.* at 137-141, Trial Transcript

object to the District Court's subsequent instructions on causation, to the effect that the jurors were to consider causation only if they first found that the City was liable and, therefore, that Scott-Harris had suffered a legally actionable injury arising out of the legislative process. The Individual Defendants believed, and continue to believe, that these instructions were correct. They require that the judgment against the Individual Defendants be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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at 8:80, 81 (where, after counsel expressed concern as to whether the causation standard for the Individual Defendants had been made sufficiently clear, the district court responded by saying that "I would be reluctant to tamper with the proximate cause instruction. I said they can't find against these folks unless they find against the City of Fall River. . . .").